IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

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MICHAEL RODAK, JR., CLERK

No. 73-1193

CHARLES RAY CONSIDINE, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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CHARLES RAY CONSIDINE, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

The Petitioner Charles Ray Considine respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on November 21, 1973.

OPINIONS BELOW

The majority and dissenting opinions of the Court of Appeals for the Ninth Circuit, which has not been reported, appears in Appendix B hereto. No opinion was rendered by the District Court for the Southern District of California. The Findings of

Fact and Conclusions of Law, made by the Honorable William B. Enright, District Court Judge, which will not be reported, appears in Appendix A hereto. The order of the Court of Appeals denying the petition for rehearing and suggestion for rehearing *en banc* appears in Appendix C hereto.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on November 21, 1973. A timely petition for rehearing and suggestion for rehearing *en banc* was denied on January 7, 1974, and this petition for certiorari was filed within 30 days of that date. This Court's jurisdiction is invoked under *28 U.S.C. § 1254(1)*.

QUESTIONS PRESENTED

1. Whether, as a matter of law, a taxpayer may be convicted of "willfully" making a return which he does not believe to be true and correct, in violation of *Section 7206(1)* of the *Internal Revenue Code of 1954*, when the basis of such conviction is the failure to report certain payments as interest income, absent proof that existing federal tax cases support a holding that, beyond a reasonable doubt, such payments were interest, includible in gross income?

2. Whether, as a matter of law, a taxpayer may be convicted of "willfully" making a return which he does not believe to be true and correct, in violation of *Section 7206(1)* of the *Internal Revenue Code of 1954*, when the basis of such conviction is the failure to report net capital gain realized upon the disposition of an installment obligation in 1969, absent proof that existing federal tax cases support a holding that, beyond a reasonable doubt, a

disposition of an installment obligation did occur and that, as a result, net capital gain, includible in income in 1969, was realized by the taxpayer?

3. Whether it is a denial of due process of law as defined in *Stirone v. United States, 361 U.S. 212 (1960)* and *Garner v. Louisiana, 368 U.S. 157 (1961)*, to convict a taxpayer upon an indictment charging that he claimed a deduction knowing he was not entitled to such a deduction in any amount, in violation of *Section 7206(1)* of the *Internal Revenue Code of 1954*, when it is found that he is, in fact, entitled to a deduction, although not in the amount claimed?

4. Whether a defendant can effectively waive his right to a trial by jury guaranteed by *Article III, Section 2, Clause 3* and the *Sixth Amendment* where the indictment presents only a question of law and the conviction is based upon the resolution of a question of fact not presented in the indictment?

STATUTORY PROVISION INVOLVED

United States Code, Title 26:

§ *7206(1). FRAUD AND FALSE STATEMENTS.*

Any person who--

> (1) Declaration Under Penalties of Perjury. Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter . . . .

shall be guilty of a felony and, upon conviction

thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution.

STATEMENT OF THE CASE

The interest issue

Pursuant to Agreements dated January 18, 1965, and July 1, 1965, Petitioner Charles Ray Considine (hereinafter referred to as "petitioner"), entered into two California real estate transactions with Capri Builders, Inc. (hereinafter referred to as "Capri"), a corporation owned 90 percent by its president, a real estate broker and developer by the name of William Mirams (hereinafter referred to as "Mirams").

The first Agreement, relating to acreage known as the San Felipe property, provided for a "total purchase price" of $250,000 (later reduced to $225,000), evidenced by a note (hereinafter referred to as the San Felipe note"), having an aggregate face value of $250,000 (later reduced to $225,000). This note was payable at a specified rate beginning 10 years after January 18, 1965, and provided for "interest" payable at the rate of 6 percent per year (payable in advance, at the election of Capri, for as many as five years), with $30,000 "interest" due upon execution and $30,000 (later reduced to $27,500) "interest" due January 18, 1966. Aside from these "interest" payments, no other payments were required for ten years.

The second Agreement, relating to acreage known as the Aqua Hedionda property, provided for a total "purchase price" of $205,200 evidenced by a note having a face value of $205,200, (hereinafter referred to as the "Aqua Hedionda note"). This note was payable at the rate of 12 percent a year (including interest at the rate of 6 percent a

year) beginning 11 years after 1965, and provided for interest payable at the rate of 6 percent per year beginning one year after close of escrow, with $44,000 of "prepaid interest" payable by August 1, 1965. Aside from these "interest" payments, no amounts were due for 11 years.

Petitioner's minimum cost basis in the San Felipe property on January 18, 1965, was $28,284.25. His minimum cost basis in the Aqua Hedionda property on July 1, 1965, was $148,898.79. At the time of execution of both agreements, according to the testimony of Mirams, neither property had an ascertainable value.

In accordance with the terms of the San Felipe note, Capri paid $30,000 to petitioner on January 18, 1965. Of this amount, a total of $2,235.81 was paid to the University of San Diego, the Religions of the Sacred Heart, and the Francis W. Parker School, since each held a 1/21 interest in the San Felipe property prior to the execution of the January 18, 1965 Agreement. During 1966, as a result of the reduction of the principal amount of the San Felipe note, $27,500, rather than $30,000, was paid to petitioner pursuant to the terms of the note. Of this amount, a total of approximately $2,571 was paid to the three schools.

In accordance with the terms of the Aqua Hedionda note, Capri paid $44,000 to petitioner in 1965. Of this amount, Groton School was credited with $11,000 on account of its 25 percent interest in the Aqua Hedionda property prior to the execution of the July 1, 1965 Agreement.

In 1970, Capri forfeited the San Felipe property, deeding it to a Mrs. Norris, the then holder of the San Felipe note. The Aqua Hedionda property was also disposed of by Capri in 1970 before making additional payments, and the acquiring party assumed the Aqua Hedionda note. Accordingly, other than the $30,000 payment in 1965 and the $27,500 payment

in 1966 made in connection with the San Felipe transaction, and the $44,000 payment in 1965 made in connection with the Aqua Hedionda transaction, no payments were made by Capri on either property. In fact, the only payments petitioner was certain of receiving were the aforesaid sums, since Capri was not liable on the notes even if no additional payments were made to Considine.

Mirams, testifying for the government, stated that at the time he entered into each Agreement, he viewed each deal as an option on the property for five years (a "soft money option"), but that since his motive in both transactions was to obtain a tax deduction for the "interest" payments, he would not have entered into either transaction if the said payments had been labelled as down-payment or principal. He further stated that it was his intention to hold each of the properties during the period of the option and to sell to a buyer who would assume the San Felipe note and the Aqua Hedionda note, but not to make any "principal" payment on either transaction or complete the transaction and acquire the property unless the property appreciated in value. Accordingly, these payments were treated by Considine as consideration for options to purchase real properties (not income until the option is exercised or forfeited) or, alternatively, as payments of principal under the deferred payment of receiving and reporting gain (cash applied first to reduce basis and no gain until basis exceeded) in reporting his taxable income.

The District Court found that the $74,000 received by petitioner in 1965 and the $27,500 received in 1966 was interest. It further found that $60,764.19 ($74,000 less the $2,235.81 paid to the three schools for their aggregate 3/21 interest in the San Felipe property, and the $11,000 credited to Groton for its interest in the Aqua Hedionda property) was reportable as ordinary income in 1965, and that $27,500 was reportable as ordinary income in 1966. Accordingly, petitioner was found guilty

as charged in Counts One and Two of the ancillary indictment, of willfully making and subscribing joint 1965 and 1966 individual income tax returns, verified by written declarations that they were made under the penalties of perjury, which he did not believe to be true and correct as to every material matter, in that the said 1965 income tax return "reported interest income of $8,701.01, whereas, as he then and there well knew and believed, the correct reportable interest income was in the amount of $65,831.84;" and in that the 1966 income tax return "reported interest income of $23,811.00, whereas, as he then and there well knew and believed, the correct reportable interest income was in the amount of $33,786.00;" in violation of *Section 7206(1)* of the *Internal Revenue Code of 1954* (hereinafter referred to as the *"Code"*). The Ninth Circuit upheld the findings and conclusions of the District Court, stating that the "government had no burden to show that beyond a reasonable doubt under federal tax cases the interest payments were interest . . . ."

The capital gains issue

On November 20, 1968, the San Felipe note was seized by judicial process to satisfy a $1,271,133.30 judgment which was entered against petitioner and his accounting partnership, Considine and Considine, in an unrelated litigation. On November 20, or 21, 1968, petitioner and Mrs. Norris, the judgment creditor, entered into a written agreement, settling Mrs. Norris' judgment in exchange for cash and notes including the San Felipe note. The note was transferred to the escrow agent, Bank of America, Pomona Branch, in 1968, where it was held until closing of the escrow in 1969. On his 1968 partnership return for Considine & Considine, petitioner claimed a loss in the amount of $300,000 resulting from this judgment. This loss, offset by his distributive share of partnership income, was claimed on his joint 1968 individual

income tax return.

The San Felipe note had no ascertainable value in 1965, the year of execution, or at any time thereafter. Accordingly, petitioner did not include a computation of gross profit resulting from the San Felipe transaction of January 18, 1965, on his 1965 income tax return, or on any of the schedules attached thereto. Nor were any commissions or other expenses incurred in connection with the San Felipe transaction included by petitioner on his 1965 income tax return, or on any of the schedules attached thereto.

The District Court found that the San Felipe note was assigned by petitioner in 1969 in partial satisfaction of the Norris judgment, that he realized capital gains therefrom and "was required in 1969 to report capital gains in the amount of $98,357.87." Accordingly, petitioner was found guilty, as charged in Count Four of the ancillary indictment, of willfully making and subscribing a joint 1969 individual income tax return, verified by a written declaration that it was made under the penalties of perjury, which he did not believe to be true and correct as to every material matter, "in that the said income tax return reported net long term capital gains of $3,446.00, whereas, as he then and there well knew and believed, the correct reportable net long term capital gain was in the amount of $101,804.00," in violation of *Section 7206(1)* of the *Code*. The Ninth Circuit upheld the findings and conclusions of the District Court and stated that the "government had no burden to show beyond a reasonable doubt under federal tax cases . . . that the settlement resulted in an acceleration of gain in 1969."

The charitable contribution deduction issue

In the spring of 1966, during a visit to Tabor Academy (hereinafter referred to as "Tabor"), petitioner told the headmaster, James W. Wickenden,

that he was giving Tabor a 1/21 interest in the San Felipe note, worth approximately $11,904.76. At that time, Mr. Wickenden made notations on a school program that petitioner had made a gift to Tabor of such 1/21 interest. This gift was not further documented. Later, in the fall of 1966, Wickenden received a deed from petitioner for a 1/21 interest in the San Felipe note.

In 1968, before the audit had begun which led to the criminal prosecution herein, petitioner testified, in the Norris litigation referred to above, that he had made gifts of an aggregate 2/21 interest in the San Felipe note to Tabor. And, two years later, when Tabor quitclaimed its entire interest in the San Felipe note to Mrs. Norris, petitioner paid Tabor the sum of $20,000 (an amount approximately equal to the value of a 2/21 interest in the San Felipe note).

Petitioner claimed a charitable contribution deduction on his 1966 and 1967 income tax returns for gifts to Tabor of an aggregate 2/21 interest in the San Felipe note, or $23,809.52, of which $20,781.31 was claimed in 1966 and $3,028.21 was claimed as a carryover in 1967. As a result of these transactions, Counts Two and Three of the ancillary indictment alleged that petitioner did willfully make and subscribe joint 1966 and 1967 individual income tax returns, verified by written declarations that they were made under the penalties of perjury, which he did not believe to be true and correct as to every material matter in that the 1966 return "claimed a contribution deduction to Tabor Academy in the amount of $20,781.31, whereas, as he then and there well knew and believed that he was not entitled to said deduction in any amount;" and in that the 1967 return "claimed a contribution deduction to Tabor Academy in the amount of $3,028.21, whereas, as he then and there well knew and believed that he was not entitled to said deduction in any amount;" in violation of *Section 7206(1)* of the *Code*. The government refused to give a bill of particulars with

respect to the charge relating to the Tabor gifts. Counsel for the government stated, however, in the opening statement in the District Court proceedings, that "this claim for contribution is false because, in 1965, the property to which this contribution referred, namely the San Felipe property, was sold."

The District Court found that petitioner did not believe the 1966 return to be true and correct "in that he reported the charitable contribution to Tabor in the amount of $20,781.31, whereas, as he then and there well knew, he was entitled to, at most, such a contribution claim of only $11,904.76 . . ." and that he "was not entitled to claim the $3,028.21 contribution carryover as a deduction on his 1967 tax return." The Ninth Circuit held that this finding did not constitute a material variance from the indictment.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH THE PRINCIPLES ENUNCIATED BY THE SUPREME COURT OF THE UNITED STATES IN *JAMES* v. *UNITED STATES*, *366 U.S. 213 (1961)*, AND *UNITED STATES* v. *BISHOP*, *412 U.S. 346 (1973)*, RELATING TO THE DEFINITION OF "WILLFULNESS" IN A CRIMINAL PROSECUTION UNDER *THE INTERNAL REVENUE CODE OF 1954*.

The District Court found petitioner guilty of having "willfully" made and subscribed returns, verified by written declarations that they were made under the penalties of perjury, which he did not believe to be true and correct as to every material matter, in violation of *Section 7206(1)* of the *Code*,

in that he (1) failed to report the amounts received in 1965 and 1966 as a result of the San Felipe and Aqua Hedionda transactions as "interest," includible in ordinary income, and (2) failed to report net long term capital gain realized upon the assignment in 1969 of an installment obligation (the San Felipe note).[1]

The requirement of "willfulness" for purposes of criminal provisions of the *Code* has been formulated by the Supreme Court as "bad faith or evil intent," *United States* v. *Bishop*, *412 U.S. 346, 361 (1973)*; *United States* v. *Murdock*, *290 U.S. 389, 398 (1933)*, or "evil motive and want of justification," *Spies* v. *United States*, *317 U.S. 492, 498 (1943)*. In our complex tax system, uncertainty often arises, even among taxpayers who earnestly wish to follow the law, and since, as the Supreme Court has said, "[i]t is not the purpose of the law to penalize frank difference of opinion or innocent errors," *Spies* v. *United States*, *317 U.S. 492, 496 (1943)*, the element of "willfulness" involves "a specific intent which must be proven by independent evidence and which cannot be inferred from the mere understatement of income." *Holland* v. *United States*, *348 U.S. 121, 139 (1954)*. The requirement of an offense committed "willfully" is not met, therefore, if there exists a judicial gloss on the tax statute, at the time the alleged crime is committed, which supports the position taken by the taxpayer on his return. *James* v. *United States*, *366 U.S. 213 (1961)*.[2]

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[1]Petitioner was also found guilty of having violated *Section 7206(1)* of the *Code* with respect to the charitable contribution deductions claimed on his joint 1966 and 1967 individual income tax returns. *See* pages 17-20 *infra*.

[2]The issue before the Court in *James* was whether embezzled funds were to be included in the gross income of the embezzler in the year in which the

At the time the tax returns in question were filed by petitioner, and at all times thereafter, there was a substantial body of federal tax law, embodied in judicial decisions, to the effect that the payments in issue did not constitute "interest,"[3] and that the

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funds were misappropriated or whether, as had been held in *Commissioner* v. *Wilcox*, *327 U.S. 404 (1946)*, such funds did not constitute taxable income. The Court overruled *Wilcox*, but at the same time refused to sustain James' conviction, holding that the element of willfulness could not be proven, as a matter of law, in a criminal prosecution for failing to include embezzled funds in gross income so long as the statute contained the gloss placed upon it by *Wilcox* at the time the alleged crime was committed. *366 U.S. at 221-222; United States* v. *Bishop*, *412 U.S. 346, 360-361 (1973)*. Petitioner contends that a Supreme Court decision is not the only kind of "gloss" that is inconsistent with "willfulness."

[3]*See, e.g., Knetsch* v. *United States*, *364 U.S. 361 (1960); Deputy* v. *Dupont*, *308 U.S. 488 (1940); Griffiths* v. *Commissioner*, *308 U.S. 355 (1939); Gregory* v. *Helvering*, *293 U.S. 465 (1935); Tyler* v. *United States*, *281 U.S. 497 (1930); Ippolito* v. *Commissioner*, *364 F.2d 744 (2d Cir. 1966); West Virginia Northern R.R.* v. *Commissioner*, *282 F.2d 63 (4th Cir. 1960); Lynch* v. *Commissioner*, *273 F.2d 867 (2d Cir. 1959); Gilbert* v. *Commissioner*, *248 F.2d 399 (2d Cir. 1957); Autenreith* v. *Commissioner*, *115 F.2d 856 (3d Cir. 1940); Boyce* v. *United States*, *190 F. Supp. 950 (W.D. La. 1961); Ballagh* v. *United States*, *331 F.2d 874 (Ct. Cl. 1964); Broome* v. *United States*, *170 F. Supp. 613 (Ct. Cl. 1959); Lael Kovtun*, *54 T.C. 331 (1970), aff'd per curiam*, *448 F.2d 1268 (9th Cir. 1971) Max Barnett*, *44 T.C. 261 (1965); Kapel Goldstein*, *44 T.C. 284 (1965); Joseph H. Bridges*, *39 T.C. 1064 (1963); Moro Realty Holding Corporation*, *25 B.T.A. 1135 (1932); Stewart* v. *Forshay*, *20 B.T.A. 537 (1930); Michael J. Ippolito*, *24 TCM 894, Dec.*

assignment of the note did not result in gain in 1969.[4] The Ninth Circuit held that "[t]he government had no burden to show that beyond a reasonable doubt under federal tax cases the [payments in

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27,444(M), T.C. Memo 1965-167.

The common thread running through all these cases is that the economic realities of the transaction rather than the labels placed on the transaction by the parties, or their beliefs with respect thereto, will govern in determining whether interest arose. Accordingly, the Tax Court in *James A. Collins, 54 T.C. 1656 (1970)*, held that, based on the principles set forth in many of the cases cited above, a payment of $44,299.70, labelled as "prepaid interest" which was made in conjunction with a downpayment of $19,315 on a purchase and sale of a 20-unit apartment house for $158,800, was in substance a payment of "principal," as opposed to "interest." *See also Norman Titcher, 57 T.C. 315 (1971).* Similarly, petitioner here could reasonably have concluded that the payments received in 1965 and 1966 in accordance with the San Felipe and Aqua Hedionda notes were payments of principal (or, alternatively, payments in consideration for options to acquire real property) rather than interest, based on the tests set forth in the cases cited above.

[4]*See Ackerman v. United States, 205 F. Supp. 365 (D. Wyo. 1962), aff'd 318 F.2d 402 (10th Cir. 1963)* (the election required by *Treas. Reg. § 1.453-8(b)(1)* to be made by the taxpayer in order to qualify for the installment method of reporting gain, must be made in the year of sale and must contain a computation of the gross profit on the sale); *Joseph Frost, 37 B.T.A. 190 (1938)* (in the absence of such election the transaction is controlled by the taxpayer's general accounting method). Accordingly, petitioner could reasonably have concluded, based on these cases, that a valid election under *Section 453* of the *Code* had not been made on his 1965

question] were interest and that the [assignment of the San Felipe note in settlement of the 1968 Norris judgment] resulted in an acceleration of gains in 1969. Its burden was to prove facts which beyond a reasonable doubt showed the nature of those financial transactions." This, however, cannot be the test in light of the Supreme Court decision in *James* v. *United States*, *366 U.S. 213 (1961)*. Unless the government proves that these cases support a holding that, *beyond a reasonable doubt*, these payments are "interest" (*i.e.*, that, beyond a reasonable doubt, no other characterization of these

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income tax return with respect to the San Felipe transaction, since he did not include on that return a computation of gross profit resulting from that transaction, and that, therefore, he was entitled to treat the transaction as a deferred payment sale.

See also, *In re Rogers' Estate*, *143 F.2d 695 (2d Cir. 1944)* (the date of transfer to an escrow agent is the date on which an installment obligation is "distributed, transmitted, sold, or otherwise disposed of" for purposes of *Section 453(d)* of the *Code* relating to the recognition of gain or loss of the disposition of an installment obligation); *Swaim* v. *Commissioner*, *417 F.2d 353 (6th Cir. 1969)*; *Estate of W.R. Whitthorne*, *44 B.T.A. 1234 (1941)*; *T. Eugene Piper*, *45 B.T.A. 280 (1941)*; *Bailey, B. P.*, *18 B.T.A. 105 (1929)*; *J.H. Curtis, Jr.*, *25 T.C.M. 206, Dec. 27,847(M), T.C. Memo 1966-33, 35 P.H. Memo T.C. 66,033*; all supporting the proposition that the date of settlement or the date of transfer to an escrow agent is the relevant date for determining the date of disposition of an installment obligation and, hence, the year in which gain is realized under *Section 453(d)* of the *Code*. Accordingly, petitioner could reasonably have concluded, based on these decisions, that gain, if any, was realized in 1968, the year the Norris judgment was settled and the year in which the San Felipe note was transferred to the escrow agent.

payments is possible), and that, *beyond* the same kind of *reasonable doubt*, a disposition of an installment obligation did occur in 1969, the requirement that the offense be committed "willfully" is not met.[5]

Petitioner did not and does not contend that there is no evidence or substantial evidence to support the trial court's findings. Nor does he contend that, based on the record here, he could overcome the presumptive validity of the government's determination that these payments constitute interest and that there was a disposition of an installment obligation in 1969 if this were a civil tax case. The question, rather, relates to the proof required, as a matter of law, to demonstrate "willfulness" in a prosecution under the criminal provisions of the *Code*. Presumably the Supreme

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[5]*See, e.g., Unger v. United States, 159 F. Supp. 850, 854 (N.J. 1958)* wherein the court ruled, with respect to an indictment under *Section 7206* of the *Code*, that there could be no conviction of a crime because:

> "[t]he federal income tax cases do not support a holding that a jury could find, beyond a reasonable doubt, that any part of this check constituted income to Mrs. Kamm in 1949 under the situation now before the court.[13]
>
> [13]The conclusion does not mean that the taxpayer would necessarily sustain, on this record, his burden in the civil case of overcoming the presumptive validity of a finding by the tax Commissioner that this check was a 1949 item."

Court was satisfied that embezzlement funds were, beyond a reasonable doubt, income in the year in which embezzled when it decided the *James* case. Nevertheless, the Court held that, where a judicial gloss to the contrary existed at the time the return was filed, the taxpayer could not, as a matter of law, be prosecuted for willful evasion of taxes for failing to include that item in his income. Here, too, even if the Court is satisfied that, beyond a reasonable doubt, these payments constitute interest payments and that, beyond a reasonable doubt, there was a disposition of an installment obligation in 1969, it must further decide whether the judicial decisions existing at the time these returns were signed were such that, beyond a reasonable doubt, no other conclusion was possible. To hold otherwise would mean the frustration of "the pervasive intent of Congress to construct penalties that separate the purposeful tax violator from the well-meaning, but easily confused mass of taxpayers." *United States v. Bishop, 412 U.S. 346, 361 (1973).*

Accordingly, the Ninth Circuit's holding that "the government had no burden to show that beyond a reasonable doubt under federal tax cases the [payments in question] were interest and that the [assignment of the San Felipe note in settlement of the 1968 Norris judgment] resulted in an acceleration of gain in 1969," is contrary to this Court's consistent interpretation of the work "willfully" as requiring an element of *mens rea. James v. United States, 366 U.S. 213 (1961); United States v. Bishop, 412 U.S. 346 (1973).* This conflict justifies the grant of certiorari to review the judgment below.

2. THE DECISION BELOW CONFLICTS WITH THE PRINCIPLES ENUNCIATED BY THE SUPREME COURT OF THE UNITED STATES IN *STIRONE v. UNITED STATES, 361 U.S. 212 (1960)* AND *GARNER v. LOUISIANA, 368 U.S. 157 (1961)*, AS TO THE REQUIREMENT THAT A DEFENDANT MAY NOT BE CONVICTED OF A CHARGE THAT IS NEVER MADE NOR UPON A CHARGE FOR WHICH THERE IS NO EVIDENCE TO SUPPORT THE CONVICTION.

Petitioner was charged with having willfully made and subscribed returns, verified by written declarations that they were made under the penalties of perjury, which he did not believe to be true and correct as to every material matter, in violation of *Section 7206(1)* of the *Code*, in that he claimed deductions of $20,781.31 and $3,028.21 on his 1966 and 1967 income tax returns, respectively, for a charitable contribution to Tabor, when "he knew and believed he was not entitled to said deduction[s] *in any amount*." This charge was based on the government's legal argument that the contribution of a 2/21 interest in the San Felipe property could not have been made since such property had been sold prior to the date of the alleged gift. The District Court disagreed and found instead that petitioner had merely overstated the amount of his contribution by an amount equal to a 1/21 interest in the property. Nevertheless, the District Court found petitioner guilty "as charged."

It is a denial of due process of law to convict an accused upon a charge for which there is no evidence. *Garner v. Louisiana, 368 U.S. 157 (1961)*. There was *no evidence* here that petitioner did not make a charitable gift *in any amount* (the crime with which he was charged). It is undisputed, and the District Court so found, that petitioner gave a 1/21

interest in the San Felipe note to Tabor in 1966.

In addition, due process requires that conviction be based upon the charge in the indictment and not another. *Stirone v. United States, 361 U.S. 212, 215-216 (1960); Garner v. Louisiana, 368 U.S. 157, 164 (1961).* "[A] court cannot permit a defendant to be tried on charges that are not made in the indictment against him." *Stirone v. United States, 361 U.S. 212, 217 (1960).* Yet that is precisely what the court did in this case. The indictment here cannot fairly be read as charging petitioner with having willfully claimed a deduction which was $8,876.55 greater than the deduction to which he was entitled. Yet this was the crime for which he was tried and for which he was found guilty. While there was a variance in the sense of a variation between pleading and proof, that variation here destroyed petitioner's substantial right to be tried only on charges presented in the indictment. "Deprivation of such a basic right is far too serious to be treated as nothing more than a variance and then dismissed as harmless error." *Stirone v. United States, 361 U.S. 212, 217 (1960).* The Ninth Circuit's holding that petitioner's conviction "did not constitute a material variance" is in direct conflict with this principle. This conflict justifies the grant of certiorari to review the judgment below.

3. THE DECISION BELOW CONFLICTS WITH THE PRINCIPLES ENUNCIATED BY THE SUPREME COURT OF THE UNITED STATES IN *ADAMS v. UNITED STATES ex rel. McCANN, 317 U.S. 269 (1942)*, AS TO THE REQUIREMENT THAT AN EFFECTIVE WAIVER OF A TRIAL BY JURY MUST BE KNOWINGLY AND INTELLIGENTLY MADE.

Assuming arguendo that there was no material variance between the indictment and proof or verdict, nevertheless petitioner was unlawfully deprived of his constitutional right to a jury trial on the charitable contribution issue.

Rule 23(a) of the *Federal Rules of Criminal Procedure* provides for waiver of a jury trial. *Adams v. United States ex rel. McCann, 317 U.S. 269, 278 (1942)*, stated that:

> "[W]hether or not there is an intelligent, competent, self-protecting waiver of jury trial by an accused must depend upon the unique circumstances of each case."

Similarly *8 Moore's Federal Practice* ¶ 23.03[1], at 23-6, commenting on waiver of a jury trial, states:

> "A wide range of considerations may enter into an attorney's opinion whether his client's interests would be better served by a court trial."

The indictment charged petitioner with having willfully made and subscribed returns, verified by written declarations that they were made under the penalties of perjury, which he did not believe to be true and correct as to every material matter, in violation of *Section 7206(1)* of the *Code*, in that he

claimed deductions of $20,781.31 and $3,028.21 on his 1966 and 1967 income tax returns, respectively, for a charitable contribution to Tabor, when "he knew and believed he was not entitled to said deduction[s] *in any amount.*" This charge was based on the government's legal contention that the contribution of a 2/21 interest in the San Felipe property could not have been made since such property had been sold prior to the date of the alleged gift. Since the above discussed interest and capital gain issues, as analyzed by petitioner's counsel, presented only those legal issues set forth in this petition, and since the indictment, as amplified by the government's opening statement, raised only the legal question whether the San Felipe property had been sold prior to the gift to Tabor of an interest in such property, petitioner's counsel saw no factual questions presented by any of the issues involved and, accordingly, waived the jury. However, with respect to the charitable contribution issue, petitioner was in fact tried and convicted of having willfully claimed a deduction which was $8,876.55 greater than the deduction to which he was entitled. Since petitioner and his counsel could not have known from the actual indictment, as amplified by the government's opening statement in the District Court, that the factual issues of whether petitioner intended to make a gift to Tabor of a 2/21 interest in the San Felipe property, rather than a 1/21 interest, and whether he did not therefore have the requisite "willful" intent were to be tried, the waiver was ineffective and petitioner was deprived of his *Article III, Section 2, Clause 3* and *Sixth Amendment* right to a trial by jury as defined by this Court in *Adams v. United States ex rel. McCann, 317 U.S. 269 (1942)*. As a result the Ninth Circuit's affirmance of the conviction is in conflict with the principles enunciated in *Adams v. United States ex rel. McCann, 317 U.S. 269 (1942)*. This conflict justifies the grant of certiorari to review the judgment below.

4. THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING PROBLEMS AS TO WHETHER "WILLFULNESS" UNDER *SECTION 7206(1)* OF THE *INTERNAL REVENUE CODE OF 1954* CAN BE PROVEN, AS A MATTER OF LAW, WHEN THERE ARE FEDERAL CASES WHICH SUPPORT THE POSITION TAKEN BY THE TAXPAYER IN REPORTING INCOME ON HIS FEDERAL INCOME TAX RETURN.

The ramifications of the decision below are far reaching. For example, if a taxpayer can be convicted under *Section 7206(1)* for adopting one of several conflicting tax treatments for a transaction when there are cases supporting that position, there is no logical reason why a lawyer who advised a taxpayer is not quilty under *Section 7206(2)* for counseling the filing of a false statement. The Ninth Circuit decision does not confront the issue of whether "willfulness" under *Section 7206(1)* of the *Code* can be proven, as a matter of law, when there are federal cases which support the position taken by the taxpayer in reporting income on his federal income tax return. The issue is of manifest importance in the administration of the criminal provisions of the *Code* and should be promptly resolved by this Court.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Criminal No. 13170
	)	
CHARLES RAY CONSIDINE,	)	
	)	
Defendant.	)	
	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Defendant was indicted in four counts for having made false and fraudulent statements in tax returns in violation of Title 26, United States Code, Section 7206(1).

The defendant waived trial by jury with the approval of the court and the consent of the government pursuant to Rule 23(a) of Federal Rules of Criminal Procedure.

After a careful consideration of all the testimony, the exhibits in evidence, and the relevant statutory and decisional law, the court, upon defendant's request and pursuant to Rule 23(c) of Federal Rules of Criminal Procedure, finds as follows:

FINDINGS OF FACT

1. In reference to Count One, in 1965 the defendant and his wife were the sole owners of real property known as "San Felipe." The San Felipe property was initially a part of a larger acreage known as Rocking Tee Ranch purchased in 1950 in the names of the defendant and his wife as joint tenants. Certain parcels were sold in 1963 and 1964 leaving San Felipe the remaining parcel in 1965.

2. In 1965 following negotiations conducted with William Mirams, the defendant sold San Felipe property to Capri Builders, Inc. for the selling price of $250,000. Mirams was 90 percent shareholder and president of Capri Builders, Inc.

3. The selling price of the San Felipe property was based upon $500 per acre. In 1966, after a determination was made that there was a deficit in the total acreage, the selling price was proportionately reduced to $225,000.

4. The defendant was to receive five years' prepaid interest totalling $60,000, $30,000 of which was payable in 1965 and the remaining $30,000 payable in 1966 on the note secured by a trust deed.

5. Defendant failed to report in his 1965 tax return any portion of the payment of $30,000 received by him in 1965.

6. In 1965 the defendant negotiated the sale of property known as Agua Hedionda. At that time defendant's wife owned 75 percent and Groton School 25 percent.

7. The selling price of the Agua Hedionda property was $205,200 based upon $3600 per acre. Defendant conducted negotiations with Mirams. The purchaser agreed to pay, and did pay, $44,000 to be applied toward prepaid payment of interest on the

note and trust deed. The defendant received the $4,000 outside of escrow and the $40,000 through escrow from the purchaser, Capri Builders, Inc., in 1965.

8. The defendant treated these payments received from Capri Builders, Inc. on both sales as interest in all respects except that he did not report them as such. Defendant's position relating to mental calculations that made interest payments principal is not tenable. Certain documents in evidence prepared by the defendant contradict his testimony. These are his letter to the escrow company, Exhibit 56, wherein he stated that "Prepaid interest must always be interest..." and the 1965 tax return, Exhibit 1, wherein he stated he received no principal on either sale in 1965. The statement on the tax return reads: "No principal payments received--we elect to report on the installment basis." The Court believes Agent Hill when he said that he was told by the defendant that the prepaid interest was interest and not principal.

9. The impact of Exhibit 11-D is extremely significant as to basis and as to interest. The defendant was aware of the significance of that exhibit, and his testimony purporting to deny his specific authorship strains credulity.

10. The plain reading of 11-A, B and C is consistent with the preparation and mode of presentation of 11-D. Considering defendant's testimony in other respects, it is unlikely that the information came, as the defendant suggests, from either his son, Tim, or from Agent Hill. The defendant did not recopy the summary of anyone else. He prepared Exhibit 11-D.

11. In reference to Count Two, due to the acreage adjustment on the San Felipe sale, the $30,000 prepaid interest payable in year 1966 was reduced to $27,500, which amount was paid by Capri Builders, Inc. to the defendant in that year.

12. Of the $27,500 interest income received by defendant, only $17,525 was reported by him on his 1966 tax return.

13. The defendant gave varying treatment of the same transactions in two different years. He claimed that the payment received in 1965 on the San Felipe sale, designated as prepaid interest, was a return of principal, whereas in 1966 he treated similarly designated payments received as interest. The facts which he asserts by way of defense are not supported by persuasive evidence. The essence of the defendant's testimony concerning the different treatment is dependent in part upon the alleged improvements made on the San Felipe property in the interim by Capri Builders, Inc. This contention is contradicted by Mirams, who stated there had been no improvements whatsoever.

14. The defendant is a practicing certified public accountant since 1946. He is a partner in the accounting firm of Considine and Considine. He has a master's degree in business economics. He has lectured on the income aspects of real estate transactions at many real estate seminars, and at several universities. This experience and education in the field of accounting, and its related areas, considered with the evidence as a whole, tend to negate any mistake or inadvertence on defendant's part.

15. The defendant claimed a charitable contribution to Tabor Academy on his 1966 tax return in the amount of $23,809.52. Because of a percentage ceiling on contributions, $20,781.31 of the $23,809.52 claimed to have been donated to Tabor Academy was taken as a charitable deduction leaving the amount of $3,028.21 to be carried forward as a contribution on the defendant's 1967 tax return.

16. The defendant claimed a value of $11,904.76 on each of the two alleged conveyances

of 1/21 interest on San Felipe property to Tabor Academy in 1966. This value is equal to 1/21 of the $250,000 which was the fair market value of the San Felipe property. San Felipe was sold by defendant in 1965 for $250,000. When the 1966 tax return was filed the selling price had already been reduced to $225,000 because of an acreage variance.

17. Defendant and his wife in 1965 conveyed by grant deed, recorded January 9, 1965, all of their interest in the San Felipe property and received back a trust deed and note in the amount of $250,000 recorded January 18, 1965. The note was made payable to the defendant and his wife.

18. Defendant recorded on November 16, 1966 a quitclaim deed purporting to convey by defendant and his wife to Tabor an undivided 1/21 interest in the San Felipe property. There is no record of any other conveyance to Tabor in 1966.

19. Defendant's relationship with Tabor Academy does not appear to have been an arm's length transaction relative to the deductions claimed. Defendant was asked by Tabor Headmaster Wickenden what reply was to be made to an inquiry by IRS and the defendant's response is set forth in Exhibit 58. Mr. Wickenden appears from the evidence to have replied in the manner indicated specifically by the defendant and in this regard there is significance in Mr. Wickenden's use of the words in Exhibit 57, ". . . that we should not cross wires."

20. In reference to Count Three, the defendant on his 1967 tax return claimed as a contribution carry-over from 1966 a contribution to Tabor Academy in the amount of $3,028.21.

21. In reference to Count Four, in 1965 defendant received a note secured by a trust deed from Capri Builders, Inc. on the sale of the San Felipe property. The trust deed was recorded January 18,

1965. The note was made payable to the defendant and his wife, and the trust deed was in the name of defendant and his wife as joint tenants. The note, in the face value of $250,000, was in 1966 reduced because of an acreage variance to $225,000.

22. In 1968 a malpractice judgment in the amount of approximately $1,300,000 was rendered against the defendant. The amount of the judgment was reduced by settlement to $400,000. On the 1968 Partnership Return, Considine and Considine, defendant claimed malpractice loss in the amount of $300,000. This loss was offset by defendant's distributive share of partnership income, and the net loss in the amount of $283,465.79 was claimed on his tax return for the year 1968.

23. In 1969 defendant assigned to the judgment creditor the Capri trust deed and note in partial satisfaction of the malpractice judgment. The assignment was for the then face value of $225,000.

24. Defendant reported the San Felipe sale on his 1965 tax return as an installment sale. No principal payments were received by defendant or his wife prior to their assignment of the note and trust deed in 1969 in satisfaction of the outstanding judgment. The assignment was recorded January 20, 1969.

25. The defendant's testimony that he believed that he was insolvent immediately before and immediately after the assignment of the Capri trust deed and note in 1969, and, therefore, in his belief, was not required to report the gain realized upon the assignment is not persuasive or credible.

26. The defendant prepared and subscribed the 1965, 1966, 1967 and 1969 tax returns. Each tax return was filed with the Internal Revenue Service. The defendant filed or caused to be filed the returns.

CONCLUSIONS OF LAW

1. The $30,000 received by defendant in 1965 from Capri Builders, Inc. was, in fact, interest, and was reportable as ordinary income in the defendant's joint U. S. Individual Income Tax Return.

2. In his 1965 tax return, the defendant was required to report $27,764.19 as interest income received from Capri Builders, Inc., after deducting $2,235.81 paid by defendant to the three charities for their interest in the San Felipe property.

3. Defendant's wife's share of the $44,000 prepaid interest received in 1965 as a result of the Agua Hedionda sale was interest and as such was reportable as ordinary income in the defendant's 1965 tax return. Groton's share of the prepaid interest was $11,000. The defendant was required to report the wife's $33,000 as ordinary income in 1965. The defendant reported only $3,633.36 of the $33,000 received on the Agua Hedionda sale, thereby understating interest income received on that sale in the amount of $29,366.64.

4. Defendant willfully made and subscribed his 1965 tax return which contains his written declaration that it is made under penalty of perjury. He did not believe the return to be true and correct in that he reported interest of $8,701.01, whereas, as he then and there well knew, he was required to report a total interest income of $65,831.84. Specifically, the defendant knowingly failed to report interest income from the San Felipe sale in the amount of $27,764.19 and understated interest income received in the Agua Hedionda sale in the amount of $29,366.64.

5. In reference to Count Two, the amount of $27,500 paid by Capri Builders, Inc. to the defendant in 1966 and identified as prepaid interest on certain exhibits, was interest, and as such was

required to be reported by defendant as ordinary income on his 1966 tax return.

6. Having reported only $17,525.00 as interest income in his 1966 tax return, defendant knowingly understated his interest income from the San Felipe sale in the amount of $9,975.00.

7. As to that portion of the contribution claimed relative to the recorded 1/21 undivided interest to Tabor Academy, the government has failed to prove its case beyond a reasonable doubt.

8. The defendant falsely claimed on his 1966 tax return as a contribution to Tabor the alleged June 1966 gift in the amount of $11,904.76, $3,028.21 of which was carried over as a contribution claim by defendant in his 1967 tax return.

9. Defendant willfully made and subscribed his 1966 tax return which contains his written declaration that it is made under penalty of perjury. He did not believe the return to be true and correct in that he reported interest income in the total amount of $23,811, whereas, as he then and there well knew, he was required to report interest income in the total amount of $33,786. Specifically, the defendant knowingly understated interest income received on the San Felipe sale in the amount of $9,975.

10. Defendant did not believe the 1966 return to be true and correct in that he reported the charitable contribution to Tabor in the amount of $20,781.31, whereas, as he then and there well knew, he was entitled to, at most, such a contribution claim of only $11,904.76, thereby overstating his contribution claim by $8,876.55.

11. The defendant was not entitled to claim the $3,028.21 contribution carry-over as a deduction on his 1967 tax return.

12. Defendant willfully made and subscribed the 1967 tax return which contains his written declaration that it was made under penalty of perjury. He did not believe the return to be true and correct in that he claimed a contribution carry-over in the amount of $3,028.21, whereas, as he then and there well knew, he was not entitled to claim any portion thereof.

13. Defendant and his wife were the sole owners of the San Felipe property prior to the sale of the property to Capri Builders, Inc. in 1965. He treated the property as his own. He reported previous transactions of like character as his own on tax returns.

14. The defendant having assigned in 1969 the Capri trust deed and note for face value of $225,000 in partial satisfaction of the malpractice judgment realized income therefrom and was required in 1969 to report capital gains in the amount of $98,357.87. The defendant knowingly did not report, in any manner, income received on the assignment of said note and trust deed.

15. Defendant willfully made and subscribed his 1969 tax return which contains his written declaration that it is made under penalty of perjury. He did not believe the return to be true and correct in that he reported net long term capital gains of $3,446, whereas, as he then and there well knew, he was required to report additional capital gains in the amount of $98,357.87 received on the assignment of the note and trust deed making the required reportable net long term capital gain $101,803.87.

16. It was not necessary for the government to prove the defendant himself specifically filed the returns.

In summary, there are significant areas of defendant's testimony which are not credible or persuasive. The government established beyond a

reasonable doubt the guilt of the defendant on the four counts as charged in the indictment. From the evidence taken as a whole, these representations were false and the defendant knew them to be false at the time he subscribed to the tax returns for the years 1965, 1966, 1967 and 1969.

Accordingly, the court finds the defendant guilty as charged.

DATED: March 2, 1973.

/s/ William B. Enright
William B. Enright, Judge
United States District Court

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff - Appellee,	)	
	)	
vs.	)	No. 73-1804
	)	
CHARLES RAY CONSIDINE,	)	
	)	
Defendant - Appellant.	)	
	)	

MEMORANDUM

November 21, 1973

Appeal from the United States District Court
for the Southern District of California

Before: CHAMBERS and CHOY, Circuit Judges, and CARR,* District Judge.

Considine appeals from his conviction in a trial to the court on four counts of subscribing to false income tax returns for the years 1965, 1966, 1967 and 1969 under 26 U.S.C. §7206(1). He was

*The Honorable Charles H. Carr, Senior United States District Judge for the Central District of California, sitting by designation.

sentenced to custody of the Attorney General for eighteen months on each count concurrently. We affirm.

A practising certified public accountant since 1946, Considine has studied law and has taught accounting and taxation in the University of San Diego and San Diego State College. He has also conducted real estate seminars at Stanford University. He is well-versed in the niceties of federal tax law as he admits.

The district court ruled that the $30,000 of prepaid interest Considine received in 1965 and the $27,500 of prepaid interest he got in 1966 were in fact interest payments beyond a reasonable doubt, which he should have reported in his tax returns. We agree.

We are not impressed by Considine's cleverly contrived contention that the interest payments were not really interest beyond a reasonable doubt under federal tax cases because they could by torturous reasoning be regarded, e.g., as consideration paid for an option to purchase real properties, or payments of principal. The promissory notes which the maker executed called the payments interest and Considine himself treated the remittance as interest in his 1965 and 1966 income tax returns.

Nor do we find convincing Considine's argument that there was no proof beyond a reasonable doubt that in 1969 he had an acceleration of gain from the disposition of an installment obligation (the $225,000 San Felipe note). The record amply supports the district court's finding that the settlement of the Norris judgment in which the judgment creditor accepted that note occurred in 1969 and that the fair market value of the note was its face amount as reduced because of acreage variation. The settlement could not be closed till March, 1969 after the bank which acted as escrow agent for the parties loaned Considine the cash required in

addition to the $225,000 note to meet the settlement terms.

The government had no burden to show that beyond a reasonable doubt under federal tax cases the interest payments were interest and that the settlement resulted in an acceleration of gain in 1969. Its burden was to prove facts which beyond a reasonable doubt showed the nature of those financial transactions. The district court was satisfied with such proof. It was not clearly erroneous in its findings and conclusions.

Considine's exoneration as to one of the two alleged falsely claimed charitable deductions, but conviction on the other deduction, did not constitute a material variance from the indictment. No substantial rights of the accused were prejudiced -- he was informed of the charges against him and enabled to present his defense, and he would be protected against another prosecution for the same offense. Goldbaum v. United States, 204 F.2d 74, 78 (9th Cir. 1953), cert. denied 346 U.S. 831, rehearing denied 346 U.S. 880.

The district court's finding that the $3,028.21 charitable deduction carry-over related to the falsely claimed contribution was not clearly erroneous.

We deem frivolous the contention that the government was required to prove that Considine himself filed or caused to be filed the tax returns underlying each of the four counts in the indictment. It was proved that Considine prepared and signed the returns and that the returns were on file with the Internal Revenue Service. The inference that he filed or caused to be filed the returns is clear and was uncontradicted.

Affirmed.

CARR, District Judge, concurring in part and dissenting in part:

I concur in the affirmance of the judgment of conviction on Count one.

I am compelled to conclude that the Government's case was insufficient to support the judgments of conviction respecting Counts Two, Three and Four. My main concern is with the issues of law in each of the three counts. Many interpretations of the Internal Revenue Code and the Treasury Regulations were required. A reading of the Reporter's Transcript, as well as a study of the exhibits, compels me to conclude that the transactions involved in Counts Two, Three and Four are matters for the civil courts. The Government is required to prove every element of the offenses beyond a reasonable doubt.

It does not seem appropriate to resort to the concurrent sentence doctrine since Treasury will, in all probability, endeavor to assess tax penalties upon the theory that the finding of guilt stamps the transactions as fraudulent. Benton v. Maryland, 395 U.S. 784 (1969).

The distinction between tax avoidance and tax evasion is sometimes difficult to discern. As Judge Learned Hand said in Commissioner of Internal Revenue v. Newman (2nd Cir. 1947), 159 F.2d 848 at 850:

> " * * * Over and over again courts have said that there is nothing sinister in so arranging one's affairs as to keep taxes as low as possible. Everybody does so, rich or poor; and all do right, for nobody owes any public duty to pay more than the law demands: taxes are enforced exactions, not voluntary

contributions. To demand more in the name of morals is mere cant."

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff - Appellee,	)	
	)	
vs.	)	No. 73-1804
	)	
CHARLES RAY CONSIDINE,	)	
	)	
Defendant - Appellant.	)	
	)	

ORDER

Before: CHAMBERS and CHOY, Circuit Judges, and CARR,* District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing and reject the suggestion for rehearing en banc.

*The Honorable Charles H. Carr, United States District Judge for the Central District of California, sitting by designation.

The full Court has been advised of the suggestion of an en banc hearing and no Judge of the Court has requested a vote on the suggestion for rehearing en banc. Federal Rules of Appellate Procedure 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

Dated January 7, 1974.